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Supreme Court, U.S.
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No. 02-871

In The

Supreme Court of the United States

RONEN JACK AMIR,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petitioner presents one question for review:

1. Whether the Fourteenth Amendment's prohibition against general exploratory search warrants is violated when peace officers bring a drug-detecting dog to participate in a search when drugs are not among the items specified for seizure in the search warrant?

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STATEMENT

A confidential informant advised Houston police officers that individuals working for an enterprise called U.S. Apparel purchased authentic merchandise from retail stores and then returned counterfeit merchandise to the stores for a refund. Pet. App. 2 n.2. U.S. Apparel would then sell the authentic merchandise to foreign buyers. *Id.* Based upon the information provided by the informant and an undercover police officer, investigating officers obtained a search warrant for the business premises of U.S. Apparel. *Id.*

The search warrant provided:

> YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit: U.S. Apparel which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas, with the authority to search for and to seize any and all items which are more particularly described in the attached affidavit that may be found therein including, but not limited to, counterfeit Levi, Strauss & Co. jeans, counterfeit Nike shirts, counterfeit merchandise, documents and record of U.S. Apparel pertaining to counterfeit merchandise, documents and records pertaining to ownership of U.S. Apparel, documents and records showing the names, addresses, and telephone numbers of employees of U.S. Apparel and/or any other witnesses with information concerning the operation of U.S. Apparel, and any computer equipment used in the operation of U.S. Apparel.

Pet. App. 2.

The petitioner had established a residential area within the confines of the U.S. Apparel business premises. Pet. App. 3. In order to execute the search warrant, officers entered U.S. Apparel, walked through a waiting area to a warehouse area, and up the stairs to the second floor of the building. *Id.* On the second floor, officers proceeded into the residential area of the building and observed a safe and a nightstand within that area. *Id.*

The officers brought with them a dog trained to alert to the presence of narcotics, and the dog alerted to narcotics contained in the safe and the nightstand. Pet. App. 3. Officers asked the petitioner to open the safe because they believed it might contain business records pertaining to U.S. Apparel. *Id.* The petitioner refused to open the safe, so police officers pried it open, and discovered business records and cocaine. *Id.* Police officers also discovered cocaine in the nightstand drawer, and they found drug paraphernalia and a semiautomatic pistol nearby. *Id.*

The petitioner was charged by indictment in state district court with the felony offense of possession of more than four but less than 200 grams of cocaine. *See* TEX. HEALTH & SAFETY CODE § 481.115(d) (Vernon Supp. 2003). Pet. App. 1. He filed a motion to suppress the seized cocaine, alleging that the search violated the Fourth Amendment to the United States Constitution; Article I, section 9, of the Texas Constitution; and TEX. CODE CRIM. PROC. art. 38.23 (Vernon Supp. 2003) (the Texas statutory exclusionary rule). Pet. App. 4. The trial court denied the motion to suppress evidence, noting that although it was concerned about the presence of a dog at the scene, the police were authorized by the warrant to look in the safe because of the possibility that it contained the sort of business records described in the warrant. Pet. App. 8.

After his suppression motion was denied, the petitioner entered a plea of guilty, the trial court deferred adjudication of his guilt and placed him under community supervision for a period of eight years, and the petitioner gave notice of appeal.[1] Pet. App. 1.

The Court of Appeals for the First District of Texas initially held that the search of the petitioner's residence was illegal because it exceeded the geographic scope of the warrant. Pet. App. 4. The Court of Criminal Appeals reversed the decision of the court of appeals, holding that the search of the petitioner's residence did not exceed the scope of the warrant, and it remanded the case to the court of appeals to consider the remainder of the petitioner's points of error. Pet. App. 4.

On remand, the court of appeals affirmed the petitioner's conviction in an unpublished opinion, holding that the search of the safe was authorized by the warrant, in light of the officer's testimony that he believed that the safe may contain the sort of business records described in the warrant. Pet. App. 9. The court held that the police were authorized to search wherever business records might be hidden, and that it was reasonable for the officers to believe, based upon the totality of the circumstances, that the nightstand might contain items described in the warrant. Pet. App. 7, 9. Ultimately, the court of appeals held that the warrant properly delineated the scope of the search, that the police officers' search was

[1] Under Texas criminal procedure, a defendant is entitled to appeal from an order deferring adjudication of his guilt and placing him under community supervision. *See Manuel v. State*, 994 S.W.2d 658, 661 (Tex. Crim. App. 1999).

authorized by the warrant, and that the presence of the dog did not expand the scope of the search beyond that authorized by the warrant. Pet. App. 10.

The Texas Court of Criminal Appeals denied discretionary review, with three judges dissenting. Pet. App. 11.

REASONS FOR DENYING THE WRIT

There is no compelling reason for this Court to grant the petition for writ of certiorari. The petitioner contends that the decision of the court of appeals conflicts with this Court's decisions banning general exploratory searches, and its decisions in *Kyllo v. United States*, 533 U.S. 27 (2001), *United States v. Ross*, 456 U.S. 798 (1982), and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). However, a review of those decisions reveals that no such conflict exists.

The petitioner also contends that the decision of the court of appeals resolves an important federal question unresolved by this Court in *United States v. Place*, 462 U.S. 696 (1983), and that it conflicts with the decision of the Court of Appeals for the Second Circuit in *United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985). However, the Texas court of appeals relied upon the trial court's factual findings in resolving the suppression issue in this case, and a petition for writ of certiorari should not be granted on an asserted error regarding a trial court's factual findings. *See* United States Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . .").

Moreover, the opinion from which review is sought is unpublished and has no precedential value to the jurisprudence of Texas.

I. NO CONFLICT EXISTS BETWEEN THE OPINION OF THE COURT OF APPEALS AND THIS COURT'S DECISIONS IN *JOHNSON*, *STANFORD*, *LO-JI SALES, INC.*, *KATZ*, *GARRISON*, *HORTON* AND *WILSON*.

The Fourth Amendment to the United States Constitution provides that, "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The manifest purpose of the particularity requirement is to prevent general searches. *See Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The Fourth Amendment does not permit open-ended warrants. *See Lo-Ji, Inc. v. New York*, 442 U.S. 319, 326 (1979). A warrant which does not purport to particularly describe the thing to be seized, but instead leaves it to the discretion of the officials conducting the search, violates the Fourth Amendment. *Id.*

This Court has held that the Fourth Amendment requirement that warrants particularly describe the things to be seized "makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." *Stanford v. Texas*, 379 U.S. 476, 485-486 (1965). In *Stanford*, this Court held that a

warrant ordering officers to search for books,[2] records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning a state Communist Party and its operations was a general warrant and violated the constitutional requirement that warrants shall particularly describe things to be seized. *Id.* In *Lo-Ji, Inc.*, this Court held that a warrant which left to the discretion of police officers the decision as to what was "obscene" did not particularly describe the things to be seized, and thus violated the Fourth Amendment. *Lo-Ji, Inc.*, 442 U.S. at 326.

In the present case, it is undisputed that the warrant particularly described the things to be seized from the premises of U.S. Apparel: counterfeit merchandise, documents and records pertaining to counterfeit merchandise, and documents and records pertaining to the ownership and employees of U.S. Apparel. The documents and records described in the warrant pertained to an illegal enterprise. The petitioner never challenged the validity or specificity of the description of the property to be seized, and the court of appeals found that the warrant adequately defined the scope of the search. Pet. App. 10.

Because the warrant in issue satisfied the Fourth Amendment requirement of particularity in the description of the items to be seized and was not a "general warrant," the petitioner is incorrect in arguing that the

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[2] This Court noted in *Stanford* that the word "books," as used in the warrant in issue in that case, referred to literary material, which is quite different from a "book" which is no more than a ledger of an unlawful enterprise. *Stanford*, 379 U.S. at 486, n.16.

opinion of the court of appeals conflicts with this Court's decisions in *Stanford* and *Lo-Ji Sales, Inc.*

The court of appeals correctly noted in its opinion that once the police officers were inside the residence, the warrant allowed them to search wherever business records might be hidden. Pet. App. 7, 9. This holding is consistent with this Court's decisions in *United States v. Ross*, 456 U.S. 798, 820-21 (1982), and *Garrison*, 480 U.S. at 84. Officers may search all areas in which items specified in the warrant may be found, including areas that may be enclosed. *Id.*

The officers in the present case searched areas in which business documents could be found, including the safe and the nightstand. The trial court believed the officer's testimony that he looked in the safe because business records are often kept in a safe, and its factual finding should be afforded great deference.

In the course of the search for items described in the warrant, the officers saw cocaine, and because they were in a place where they had a right to be, they were authorized to seize the cocaine under the "plain view" doctrine. *See Lo-Ji, Inc.*, 442 U.S. at 326 n.5 ("Of course, contraband may be seized without a warrant under the 'plain view' doctrine."); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) ("An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.").

The dog's presence at the scene was inconsequential. The court of appeals properly found that the dog's presence did not affect the legality of the search or the seizure

of the cocaine. Pet. App. 9. The court of appeals accurately found that the officers stayed within the scope of the search authorized by warrant. Pet. App. 10.

The petitioner incorrectly suggests the existence of a conflict between the opinion of the court of appeals and this Court's decisions in *Johnson v. United States*, 333 U.S. 10 (1948), and *Katz v. United States*, 389 U.S. 347 (1967). Neither of those cases required a determination of the scope of a search warrant.

Johnson involved a search of a hotel room without a warrant. *Katz* pertained to the government's warrantless activity in electronically listening to and recording a suspect's conversation as he spoke in a public telephone booth. This Court found in *Katz* that the government's eavesdropping constituted a search and that the warrantless search violated the defendant's Fourth Amendment rights. In the present case, officers gained lawful entry into the petitioner's business, including the residential area contained within that business, under the authority of a search warrant, and, consequently, *Johnson* and *Katz* are inapplicable and distinguishable.

The petitioner is also incorrect in his contention that the opinion of the court below conflicts with this Court's decision in *Horton v. California*, 496 U.S. 128 (1990). In *Horton*, this Court noted that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Id.* at 138. Thus, when a police officer has a "valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause," such suspicion does not "immunize the second item from seizure if it

is found during a lawful search for the first." *Id.* The Fourth Amendment does not prohibit warrantless seizure of evidence of a crime in plain view, even if discovery of the evidence was not inadvertent. *Id.*

In this case, officers were authorized by the valid warrant to enter and search any and all areas within the premises which could contain documents or records. The officers were authorized to look in the safe and nightstand under the authority of the search warrant. Consistent with this Court's holding in *Horton*, the court of appeals properly held that seizure of the drugs in plain view during the search for documents and records did not violate the petitioner's Fourth Amendment rights. *See Horton*, 496 U.S. at 138 (seizure of weapons not described in a warrant, but found in plain view while searching the defendant's residence for the stolen property described in the warrant, did not violate the Fourth Amendment, even though the weapons were not discovered "inadvertently").

Furthermore, the opinion of the court of appeals does not conflict with this Court's decision in *Wilson v. Layne*, 526 U.S. 603 (1999), as contended by the petitioner. In *Wilson*, this Court held that it violated homeowners' Fourth Amendment rights when police officers brought a newspaper reporter and photographer with them when they entered the home, under the authority of an arrest warrant, to arrest the homeowners' son. *Wilson*, 526 U.S. at 611. This Court held that while not every police action inside a home "must be explicitly authorized by the text of the warrant," the Fourth Amendment does require that "police actions in execution of a warrant be related to the objectives of the authorized intrusion." *Id.*

In *Wilson*, the presence of reporters who did not engage in the execution of the warrant or assist police in their task was unrelated to the objective of the authorized intrusion, which was the arrest of the homeowners' son. *Id.* This Court noted, however, that although there was no constitutional justification for a media ride-along intrusion into the home while police executed an arrest warrant, it might be reasonable for police themselves to video-tape home entries. *Id.* In addition, the Court observed that the police were lawfully present in the home, and that the violation of the Fourth Amendment was the result of the presence of the media, rather than the police, in the home. *Id.* at 614 n.2. The Court also stated, "We have no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives." *Id.*

Because this Court's opinion in *Wilson* involved a monetary suit for damages and not the exclusionary rule, it is inapplicable to the present case and does not conflict with the decision of the court below.

Also, this case differs from *Wilson* in that the canine unit cannot be said to constitute a "third party" present during execution of the search warrant. The canine unit was a part of the Houston Police Department, and was authorized to be present during the execution of the warrant, as would any other member of the police force. Canine units now constantly and routinely assist police officers in a wide variety of tasks, and they might be useful in the execution of a search warrant in several different ways. For instance, a canine unit could provide protection against other dogs on the premises, warn the police of explosive devices which might jeopardize their safety during a search, or assist in seeking out persons

hidden within the premises, in order to minimize the risk of harm to the officers. *See Michigan v. Summers*, 452 U.S. 692, 705 (1981) (Fourth Amendment allows temporary detention of the occupants of premises while police search the premises pursuant to a search warrant). Canine units are an intrinsic part of modern police work, and there is no similarity between a police canine unit and the civilians who accompanied police officers in *Wilson*.[3]

In short, there is no conflict between the decision of the court of appeals in this case and this Court's holdings in *Johnson*, *Stanford*, *Lo-Ji Sales, Inc.*, *Katz*, *Garrison*, *Horton*, and *Wilson*.

II. THE DECISION BELOW DOES NOT RESOLVE AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT ALREADY BEEN RESOLVED.

The petitioner contends that a writ should issue because the state court below has decided an important question of federal law that has not been, but should be, settled by this Court, namely, whether the use of a drug-detecting dog inside a residence constituted a "search." However, the court of appeals did not determine whether or not the dog sniff in the present case constituted a "search." Rather, that court noted that the dog's presence

[3] The petitioner seems to be arguing that the police could have brought with them a dog trained to sniff out counterfeit jeans, but not a dog trained to locate drugs or explosives. Pet. 11. It is difficult to believe that the constitutionality of the search turns upon the identity of the particular dog, and that the Fourth Amendment would permit the investigators to be accompanied by Officer Fido but not Officer Spot.

on the scene did not affect the legality of the officer's actions because he would have searched the safe for business records, as specified in the warrant, regardless of the narcotics dog alert. Pet. App. 9. Consequently, the decision below did not reach the question of whether a dog sniff under these circumstances constituted a "search" under the Fourth Amendment; and this Court should therefore decline to review this issue. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that the Court's "traditional rule" precludes a grant of certiorari when "the question presented was not pressed or passed upon [in the court] below").

The petitioner claims that this Court has left unresolved the question of whether a dog sniff can ever be a search, especially if conducted inside a residence, but this Court has, in fact, resolved that issue. The detection of contraband by a trained dog is not a search requiring a warrant under the Fourth Amendment. *See United States v. Place*, 462 U.S. 696 (1983). This Court specifically held in *Place* that a canine sniff of a traveler's luggage does not constitute a "search" under the Fourth Amendment of the United States Constitution. *Id.* at 707. The Court noted that a canine sniff is less intrusive than a "typical search" and does not result in the loss of privacy with respect to any matters other than the possession of contraband:

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. [Citation omitted]. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging though the contents

> of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of information revealed by the procedure.

Place, 462 U.S. at 707.

The petitioner attempts to distinguish *Place* from this case on grounds that the dog sniff in *Place* occurred in a public locale, rather than a residence. Any such distinction is a distinction without a difference. In this case, the police were authorized to be present in the residence under the authority of the search warrant, and they merely brought along their standard investigative tools, such as the canine unit, when they arrived to execute that warrant.

A neutral and detached magistrate had already found probable cause to believe that the law was being violated in the petitioner's business premises, and had already authorized a substantial invasion of the privacy of any persons who resided there. *See Summers*, 452 U.S. at 701. Thus, a neutral magistrate rather than an officer in the field made the critical determination that the police should

be given a special authorization to thrust themselves into the privacy of the designated location, which included the petitioner's on-site residence. *See id.* at 703. Once the search warrant was issued, the petitioner had a greatly diminished expectation of privacy in his residential area.

For Fourth Amendment purposes, a "search" does not occur, even when the explicitly protected area of a residence is concerned, unless a reasonable expectation of privacy exists in the object of the challenged search. *Kyllo v. United States*, 533 U.S. 27, 33 (2001).[4] An individual has no reasonable expectation of privacy in possessing illegal drugs. *See United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *see also United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998). Therefore, a government investigative technique, such as a dog sniff or chemical test, that discloses only the presence or absence of narcotics, and does not expose noncontraband items, activity, or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and is thus not a "search" for Fourth Amendment purposes. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Jacobsen*, 466 U.S. at 122-24; *Place*, 462 U.S. at 706-07.[5]

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[4] In this context, the term "object of the search" includes not only the items searched for but also the areas or aspects of a location that are searched. Therefore, the presence of illegal items in a home does not necessarily lessen the expectation of privacy there so as to allow it to be searched without a warrant, but rather, an investigative method that can only detect the existence of illegal items in a home, and does not intrude on any other areas or aspects of it, is not a search for Fourth Amendment purposes. *See Porter v. State*, 93 S.W.3d 342, 346 (Tex. App. – Houston [14th Dist.] 2002, pet. filed).

[5] *See also United States v. Tarazon-Silva*, 960 F.Supp. 1152, 1162-63 (W.D. Tex. 1997) (holding that dog sniff of dryer vent of house was

(Continued on following page)

As in *Place*, the sniff in the present case revealed nothing about the room other than the presence of narcotics. It did not intrude upon any legitimate expectation of privacy, and was not a "search" under the Fourth Amendment, much less an illegal one.

Thus this Court has not left the issue of the constitutional implications of canine sniffs unresolved, and need not grant review in the present case.

The petitioner also asserts that the decision below conflicts with the decision of a federal court of appeals in *United States v. Thomas*, 757 F.2d 1359, 1366 (2nd Cir. 1985). The *Thomas* court held that the warrantless use of a drug-sniffing dog outside the door of the defendant's residence constituted a search that impermissibly intruded on the defendant's legitimate expectation of privacy. The Texas court of appeals accurately distinguished *Thomas* in its opinion in the instant case, observing that "the facts of this case are distinguishable [from *Thomas*], however, because there is evidence in the record that the officer would have searched the safe for business records, as specified in the warrant, regardless of the narcotics dog alert." Pet. App. 9. Moreover, as discussed above, there is

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not a search), *aff'd*, 166 F.3d 341 (5th Cir. 1998); *People v. Dunn*, 77 N.Y.2d 19 (1990), *cert. denied*, 501 U.S. 1219 (1991) (holding that canine sniff outside an apartment was not a search). A dog sniff is also not a search for purposes of applying Article I, section 9, of the Texas Constitution. *Crockett v. State*, 803 S.W.2d 308, 310 n.5 (Tex. Crim. App. 1991). By contrast, the use of a thermal imaging device to record the heat being emitted from within a home is a "search" because it can reveal information about legal activity inside the home as to which individuals have a legitimate expectation of privacy. *See Kyllo*, 121 S.Ct. at 2043-46.

no legitimate expectation or interest in "privately" possessing cocaine. This is particularly true on the facts of this case, where police were inside the petitioner's residence under the authority of a search warrant and were authorized by the warrant to search any and all areas which could contain documents. Conceivably, documents could be hidden almost anywhere on the premises.

The decision in *Thomas* does not conflict with that of the court below, and no need for this Court's review has been demonstrated.

III. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *KYLLO V. UNITED STATES*.

As previously noted, the court of appeals found that the warrant in the present case limited the scope of the search, and because the evidence in the record reflected that the officer searched the safe for business records, as specified in the warrant and notwithstanding the dog's alert, the officer's search remained within the scope of the search warrant. Pet. App. 9-10. Accordingly, the court held that the presence of the dog did not enlarge the scope of the warrant. Pet. App. 10. It did not reach, nor was it required to reach, the determination of whether the dog's sniff constituted a "search." There was no need to reconcile the decision in this case with *Kyllo*, because it was unnecessary to determine whether the canine sniff was a constitutionally cognizable "search." This is not the case in which that question must be resolved.

In *Kyllo*, the police, while standing on a public street, used a thermal imaging device to determine if the amount of heat emanating from Kyllo's home was consistent with

the type of high-intensity lamps typically used for growing marihuana indoors. *Kyllo*, 533 U.S. at 28. This Court held that this was an unlawful search, stating:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Id. at 40.

Kyllo is distinguishable from the instant case for two reasons. First, unlike the search in *Kyllo*, the officers in this case had a search warrant authorizing the search of the interior of the petitioner's premises. Once officers obtained a search warrant permitting entry into any and all areas in which documents could be found, the petitioner no longer had a reasonable expectation of privacy in the interior of his room or any enclosures in which documents could be found.

Second, various devices employed for surveillance purposes differ in the degree that they implicate expectations of privacy. *See Place*, 462 U.S. at 706 (recognizing that a canine sniff as a relatively unintrusive method of gathering information due to its limitations in detecting only contraband); *United States v. Knotts*, 460 U.S. 276 (1983) (use of a beeper to track car's movements infringed no reasonable expectation of privacy); and *Smith v. Maryland*, 442 U.S. 735 (1979) (use of a pen register to record phone numbers dialed infringed no reasonable expectation of privacy). In *Kyllo*, the surveillance device used without a warrant was a sophisticated piece of technology that revealed information, other than the presence of contraband,

about the interior of Kyllo's home. *See Kyllo*, 533 U.S. at 38.

Here, the dog's sniff did not explore the details of the room; the sniff revealed nothing about the room other than the presence of cocaine. There is no legitimate expectation or interest in "privately" possessing cocaine. *See Jacobsen*, 466 U.S. 109; *see also Reed*, 141 F.3d at 650. Furthermore, odor occurs without assistance from the police, and smells have not traditionally been regarded as something in which a person could have a reasonable expectation of privacy. *See, e.g., Hill v. State*, 951 S.W.2d 244, 251 (Tex. App. – Houston [14th Dist.] 1997, no pet.).

The canine was simply an investigative tool, the use of which, as this Court has recognized in *Place*, is far less intrusive than a typical police search. The officers were authorized by warrant to enter the premises, and they were implicitly authorized to bring along the usual tools of their trade, such as flashlights, cameras, fingerprint equipment, and so forth. Bringing along an investigative tool during the execution of a search warrant does not convert a valid search pursuant to a search warrant into an invalid one. *See Knotts*, 460 U.S. at 284 ("Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.").

Because *Kyllo* is so readily distinguishable, it is unnecessary for this Court to grant certiorari in order to reconcile the present case with *Kyllo*.

IV. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS IN *UNITED STATES V. ROSS* AND *COOLIDGE V. NEW HAMPSHIRE*.

The petitioner complains that the court of appeals incorrectly found it reasonable for the investigating officers to believe, based upon the totality of the circumstances, that the nightstand might contain items described in the search warrant, such as "documents and records" pertaining to counterfeit merchandise, the ownership or employees of U.S. Apparel, or the existence of other witnesses with information concerning the operation of U.S. Apparel. Pet. App. 9.

This Court, in *United States v. Ross*, 456 U.S. at 820-821, held that officers may search all areas in which items specified in the warrant may be found, including areas that may be enclosed. Clearly, officers could reasonably believe that a document containing ownership information or the names, addresses or telephone numbers of contacts or employees might be stored in the nightstand.

In *Horton v. California*, this Court noted that "even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the officer's subjective state of mind." *Horton*, 496 U.S. at 138. In the present case, it was objectively reasonable for officers to believe that the nightstand in the petitioner's bedroom might contain documents pertaining to the business, in light of the facts that the bedroom was located within the business premises, counterfeit clothing was found in the residential area, and business records were found in the safe located in that residential area.

The petitioner contends that the decision of the court of appeals is in conflict with this Court's decision in *Coolidge*, 403 U.S. at 455. In *Coolidge*, this Court reiterated the holding in *Katz*, that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Coolidge*, 403 U.S. at 454-455. This Court in *Coolidge* also reiterated that the party seeking an exemption from the Fourth Amendment requirement of a search warrant must bear the burden of showing the applicability of an exception to the warrant requirement. *Id.*

In the present case, the officers had a valid search warrant and they proceeded to enter the premises of U.S. Apparel and execute the warrant. As determined by the court of appeals, the officers properly searched the areas in which business documents could be found. The officers were then justified under the "plain view" doctrine to seize the cocaine, after they reasonably looked in the safe and nightstand for business documents. *See Coolidge*, 403 U.S. at 465 ("An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character").

The opinion of the court of appeals is not in conflict with this Court's decisions in *Ross* or *Coolidge*. For this and all the foregoing reasons, this Court need not grant a writ of certiorari in order to resolve a conflict in decisions

or to resolve an undecided issue regarding the construction and application of the Fourth Amendment.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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